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Supreme Court, U.S.
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Docket No. 95-683

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JAN PARTIN,

Petitioner,

v.

STATE OF FLORIDA
COMMISSION ON ETHICS,

Respondent.

On Petition For Writ of Certiorari To The State of Florida District Court of Appeal For The Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner's failure to timely raise her constitutional claims barred state court review and serves as an adequate and independent state ground for the Florida appellate court's decision.

II. Whether Petitioner has demonstrated that the Florida appellate court's decision incorrectly resolved any federal questions regarding her rights under the Fifth, Sixth, and Fourteenth Amendments to the U. S. Constitution.

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STATEMENT OF THE CASE

This matter comes to the Supreme Court on an order of the Second District Court of Appeal of Florida affirming without opinion Respondent's administrative order concluding that Petitioner misused her public position, as Administrative Assistant to the Executive Director of the City of Winter Haven Housing Authority, in violation of Section 112.313(6), Florida Statutes. Section 112.313(6) prohibited Petitioner from corruptly using her official position or performing her official duties to secure a special privilege, benefit, or exemption for herself or another.

This statute is one of the standards of conduct applicable to public officers and employees in Florida; the standards are contained in the state's Code of Ethics for Public Officers and Employees, which is codified as Part III, Chapter 112, Florida Statutes. Respondent is the body charged with investigating complaints alleging violations of these state ethics laws. Section 112.322 and 112.324, Florida Statutes. Respondent's proceedings are governed by the state's Administrative Procedure Act, Chapter 120, Florida Statutes.

The case arose from a sworn complaint filed with the Respondent in March 1991, by Oswald and Leah Carrerou, landlords with the Winter Haven Housing Authority's Section 8 program, which provides rental assistance to eligible tenants. After conducting an investigation, which included a voluntarily-given interview with the Petitioner in a non-custodial setting, at which her attorney was present, the Respondent determined that there was probable cause to believe that Petitioner, while employed as Administrative Assistant, violated Section 112.313(6), Florida Statutes, by

coercing the Carrerous into making a loan to Timothy Keaton, a potential witness in a federal court trial involving the Housing Authority, and by representing to the Carrerous that the Housing Authority would repay the loan.

The matter was tried before a state administrative law hearing officer, not affiliated with the Respondent, who rendered a recommended order [Petitioner's Appendix C, pp. 14a-23a.], recommending that the Respondent enter a final order finding that Petitioner violated Section 112.313(6). The hearing officer concluded that Petitioner used her official position in order to obtain a loan from the Carrerous to benefit Timothy Keaton, a man with whom she was intimately involved. Although Petitioner testified that she merely had given Keaton the names of three individuals who might lend him money, the hearing officer found otherwise:

> In early 1990, [Petitioner] called Oswald Carrerou and asked if he would consider making a loan to a person who was very important to the Housing Authority, a witness in a federal case involving a tenant. [Petitioner] said the person needed money to pay his lawyer in a child custody dispute. Carrerou was concerned about the appearance and legitimacy of the transaction. He was not in the business of making personal loans, except in the context of his buying and selling real estate, in which cases the loans were secured by a mortgage. When he asked about collateral, [Petitioner] said something about a CD coming due and that he would be paid off then. [Petitioner] suggested that a note would be prepared, but did not say who would sign the note. Reluctantly, and with the concern

> that he had little choice, given his financial circumstances and reliance on the Section 8 rents, Carrerou agreed to the loan. [Petitioner's Appendix C, p. 17a.]

The Hearing Officer concluded further that Petitioner had acted with wrongful intent, an element necessary for finding a violation of Section 112.313(6), based upon Carrerou's dependence on the Housing Authority as a landlord and the circumstances surrounding Petitioner's relationship with Keaton, including their dating, her involvement in his child custody dispute, her loaning money to him, her urging him to hire a lawyer to get custody of his children away from their mother, who also was a Housing Authority tenant and plaintiff in the federal lawsuit against the Housing Authority, and Petitioner's calling Mrs. Carrerou for another check to pay the attorney even though she knew that Keaton had torn up the first check to avoid responsibility for repaying the loan. [Petitioner's Appendix C, pp. 16a-21a.]

Throughout the proceedings, Petitioner was represented by counsel. She had the opportunity to engage in discovery, to present evidence and argument on all issues involved, to subpoena witnesses, to conduct cross-examination and submit rebuttal evidence, and to submit proposed finding of facts and conclusions of law. See Sections 120.57(1)(b)4 and 120.58(1)(b), Florida Statutes. Petitioner was called to testify by her own counsel, did so voluntarily, and presented six exhibits and the testimony of five witnesses. [Petitioner's Appendix C, p. 15a.]

The hearing officer, pursuant to Section 112.317(1)(d), Florida Statutes (1993), recommended a penalty of restitution in the amount of $1,200 and a civil

penalty of $5,000. Section 112.317(1)(d) specifies that penalties for violating the Code of Ethics could include, in addition to a civil penalty not exceeding $5,000, "[r]estitution of any pecuniary benefits received because of the violation committed."

Petitioner's attorney filed written exceptions to the recommended order, which were considered in detail and rejected by Respondent. None of her exceptions argued that she had been denied the due process protections granted for criminal proceedings or raised any question about whether she had been provided with adequate notice of the allegations against her. [Petitioner's Appendix B, pp. 2a-11a.]

The Respondent's final order adopted the hearing officer's findings of fact, conclusions of law, and recommended penalty. In doing so, Respondent concluded that in light of the hearing officer's finding that the referral of Keaton for a loan to the Carrerous was not within the scope of the appropriate function of the Housing Authority staff, Petitioner's arranging the loan was inconsistent with the proper performance of her public duties. Also, the Respondent concluded that, as the hearing officer found that Petitioner acted with wrongful intent to obtain a benefit for Keaton and as Respondent concluded that her actions were inconsistent with the proper performance of her public duties, Petitioner acted "corruptly" within the meaning of Section 112.312(9), Florida Statutes.

Petitioner appealed this final order to the State of Florida Second District Court of Appeal. Her first four points on appeal were directed at evidentiary rulings made by the hearing officer and at the question of whether competent substantial evidence supported various findings. Her final two points on appeal argued the issues she asks this Court to

review. After oral argument, the District Court of Appeal affirmed, without opinion.

REASONS TO DENY THE WRIT

I. Petitioner's failure to timely raise her constitutional claims barred state court review and serves as an adequate and independent state ground for the Florida appellate court's decision.

Petitioner seeks review of a state court decision which disposed of her claims without a written opinion. Notwithstanding the assertions in her Petition for Writ of Certiorari, there is nothing to indicate that the state court considered or passed on the federal question. Instead, the record below indicates that Petitioner never raised her claims in the proceedings before the Commission and waited until the filing of her appellate brief to allege any such defects. Under Florida law, an administrative agency cannot be deemed to have erred by failing to act as to matters that are not brought to its attention until the filing of an appellate brief. *Florida Department of Corrections v. Bradley*, 510 So. 2d 1122 (Fla. 1st DCA 1987); *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So. 2d 1212 (Fla. 1st DCA 1991); and *Couch v. Commission on Ethics*, 617 So. 2d 1119 (Fla. 5th DCA 1993).

As Respondent argued below in response to Petitioner's due process claim (Point V of Petitioner's initial brief to the Second District Court of Appeal):

> This issue is raised for the first time in this proceeding on appeal. As this argument was

> not included in [Petitioner's] exceptions to the Hearing Officer's Recommended Order, she is foreclosed from raising the argument for the first time before this Court. *Florida Department of Corrections v. Bradley, supra*; *Environmental Coalition of Florida, Inc. v. Broward County, supra*; and *Couch v. Commission on Ethics, supra.*

[Commission's answer brief to the Second District Court of Appeal, p.41]

With regard to Petitioner's contention that Section 112.313(6), Florida Statutes, was unconstitutional because it imposed criminal punishment without the procedural safeguards of a criminal prosecution (Point VI of Petitioner's initial brief to the Second District Court of Appeal), the Commission responded:

> [Petitioner] never sought any of the procedural safeguards below that she now argues she was entitled to because of the alleged "criminal" nature of the allegations brought against her. She testified at hearing and never asserted a right to remain silent under the 5th Amendment; she never asserted the proceedings were invalid because no state attorney filed an information and no grand jury indicted her; she never asked for a jury trial; she never demanded conviction by a court; and she never argued that the civil penalties provided for in Section 112.317(1), Fla. Stat., were criminal. Although she now apparently seeks to argue ineffective assistance of counsel below, her half-hearted

> effort is limited to one and a half lines in a footnote in her brief. (I.B. 49) Questions not timely raised and ruled upon below should not be considered on appeal. 3 Fla. Jur. 2d, *Appellate Review*, § 92, and cases cited therein.

[Commission's answer brief to the Second District Court of Appeal, p.47]

In *Coleman v. Thompson*, 501 U. S. 722 (1991), *reh. den.*, 501 U.S. 1277 (1991), this Court reiterated that it would not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment, citing *Fox Film Corp. v. Muller*, 296 U. S. 2017 (1935); and *Klinger v. Mississippi*, 13 Wall. 257 (1872). The Court opined further that the rule applies whether the state law ground is substantive or procedural, again citing *Fox Film*, *supra*, and *Herndon v. Georgia*, 295 U. S. 441 (1935). In the context of direct review of a state court judgment, the independent and adequate basis doctrine is jurisdictional. *Coleman*, *supra*. Although *Coleman* involved a federal habeas proceeding and is factually distinguishable from the matter presented here, its holding that a procedural bar in a state court proceeding constitutes an independent and adequate state ground to deny habeas relief in federal court should likewise be applied here.

Further, *Illinois v. Gates*, 462 U. S. 213 (1983), applied a "not pressed or passed on below" rule to hold that if both of the requirements that a federal question had been raised and decided in the state court below do not appear on the record, the appellate jurisdiction of the Supreme Court fails. See also, *Michigan v. Long*, 463 U. S. 1032 (1983),

where the Court adopted a conclusive presumption of jurisdiction only when a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.

Without a written opinion from the Second District Court, it cannot be concluded that it appears in the record that the state court decided the federal questions asserted by Petitioner. Nor can it be said that the state court's *per curiam* affirmance rested primarily on federal law or was so interwoven with federal law as to bring it within the jurisdiction of this Court.

Thus, Petitioner's failure to timely raise her claims constituted an adequate state ground for the Second District Court of Appeal's affirmance of the Commission's final order and bars this Court's review of that decision.

II. Petitioner has not demonstrated that the Florida appellate court's decision incorrectly resolved any federal questions regarding her rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

Even if this Court concludes that Petitioner's procedural default was not an adequate and independent state ground to bar its jurisdiction, Petitioner has made no showing that the state appellate court failed to protect her constitutional rights relative to the administrative proceedings below.

Petitioner essentially presents two arguments to support her claim that Respondent's actions amounted to unconstitutional deprivations of her Fifth, Sixth, and Fourteenth Amendment rights: (a) that Respondent's proceedings were, in effect, a criminal prosecution, entitling her to the same procedural protections as provided in any criminal prosecution, including judicial review of the reasonableness or amount of the penalty; and (b) that she was denied due process because of an alleged variance between the charges and the Respondent's findings.[1]

A. Procedural Safeguards of Criminal Prosecution

Petitioner argues that the assessment of civil monetary penalties pursuant to Section 112.317, Florida Statutes (1991), constitutes the imposition of criminal punishment without the procedural safeguards of a criminal prosecution. She argues that the Respondent has imposed[2] criminal punishment without providing the procedural safeguards of a criminal prosecution. This argument fails, however, for the following reasons: (1) the Florida courts have concluded that Commission on Ethics proceedings and Code of Ethics provisions are civil and not criminal; (2) Petitioner never sought at the trial level any of the procedural safeguards that she now argues she was entitled to; and (3) Commission on

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[1]Although Petitioner sought to raise a Seventh Amendment jury trial issue before the state appellate court, she no longer asserts any argument regarding the Seventh Amendment. See Petitioner's Petition, pp. 12 and 24.

[2]Note that, pursuant to § 112.324(7), Fla. Stat., the Respondent cannot impose any penalty; it can only recommend. See *Commission on Ethics v. Sullivan*, 489 So. 2d 10 (Fla. 1986).

Ethics proceedings are not criminal and are no more criminal in nature than any other administrative proceeding that may result in disciplinary action.

Self Incrimination

Petitioner agreed to be interviewed by the Respondent's investigator and she voluntarily testified at the hearing. Petitioner did not assert a right to remain silent under the 5th Amendment until her initial brief was filed before the state appellate court. Therefore, any discussion of Petitioner's rights against self-incrimination would be purely academic at this point, since she was represented by counsel at all stages of these proceedings and was not compelled to give any testimony against herself.

Furthermore, Petitioner has cited no judicial decision holding that administrative proceedings such as the Commission's are criminal. Of particular note is *U.S. v. Ward*, 448 U.S. 242, *reh. den.*, 448 U.S. 916 (1980), where this Court held that the use of an oil spill report required under the Federal Water Pollution Control Act to support the assessment of a civil penalty for a spill, was not violative of the Fifth Amendment. There, the civil penalty was a maximum of $5,000 per violation, subsequently amended to a $50,000 cap. *Id.*, 448 U.S. at 245. Under the two-part test established in *Ward*, the first determination is whether the legislative body (there, Congress) in establishing a penalizing mechanism, indicated expressly or impliedly a preference for the civil or criminal label. The second part of the *Ward* test, where Congress has indicated an intention to establish a civil penalty, requires the Court to determine whether there is the "clearest proof" that the statutory scheme was so punitive either in purpose or effect as to negate the legislative intention. *Id.*, 448 U.S. at 249.

In *Ward, supra*, this Court found that Congress intended to impose a civil penalty upon persons in Ward's position, that is, that Congress intended to allow the imposition of penalties under the Act without regard to the procedural protections and restrictions available in criminal prosecutions. *Id.*

Similarly, there can be no doubt that the Florida ethics scheme was intended to impose civil penalties without regard to the procedural protections and restrictions available in criminal prosecutions. Penalties for violations of administrative-type laws clearly are permitted under the Florida Constitution, which provides: "No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law." Article I, Section 18, Florida Constitution. Section 112.317(1), Florida Statutes, provides for the penalties that have been recommended in this case. Moreover, in *Tenney v. State Commission on Ethics*, 395 So. 2d 1244 (Fla. 2d DCA 1981), a case involving procedural due process and vagueness issues, the court recognized that Ethics Commission proceedings involve civil penalties rather than criminal penalties. The Florida Supreme Court also has concluded that Section 112.313 does not entail criminal penalties. *D'Alemberte v. Anderson*, 349 So. 2d 164, at p. 168 (Fla. 1977).

Applying the second part of the *Ward* test, this Court found that the factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), referenced by Petitioner, were not sufficient to render unconstitutional the civil penalty established by Congress in the Federal Water Pollution Control Act (maximum $5,000). *Ward, supra*, 448 U.S. at 250-251. In other words, the sanctions Congress provided were held not to be so punitive as to "transform what was clearly intended

as a civil remedy into a criminal penalty." *Id.*, 448 U.S. at 249, quoting *Rex Trailer Co. v. United States,* 350 U.S. 148, 154 (1956).

If the $5,000 civil penalty (subsequently raised to $50,000) were not so punitive as to transform the civil penalty in *Ward* to a criminal penalty, the $5,000 maximum civil penalty and the $1,200 restitution penalty recommended by the Respondent are not so punitive as to transform these civil remedies into a criminal penalty.

Due Process (Judicial Review of Recommended Penalty)

Petitioner argues that her due process rights were violated because she had no right to judicial review of the recommended penalty. She correctly argues that as long as the penalty imposed by a Florida agency is within the permissible range of statutory law and its findings have not been modified, a reviewing court is without authority to review the reasonableness of the penalty imposed by the agency. *Florida Real Estate Commission v. Webb,* 367 So. 2d 201 (Fla. 1979); *LaRossa v. Dept. of Professional Regulation, Division of Real Estate,* 474 So. 2d 322 (Fla. 3d DCA 1985); and Section 120.68(12), Florida Statutes (reviewing court shall not substitute its judgment for that of the agency on an issue of discretion). Without providing any support for her contention that the assessment of a penalty of the magnitude recommended against her requires full judicial review, Petitioner claims that she was entitled to such review under the Fourteenth Amendment. However she fails to point to any authority which would permit a reviewing court to substitute its judgment for that of the agency to whose delegated discretion the setting of a penalty has been placed by the legislature.

Petitioner had a right to judicial review of whether Respondent abused its discretion. However, what Petitioner really is complaining about is the scope of judicial review, which Petitioner notes is limited to a determination of whether the recommended penalty is within the limits provided by law. Such review does not extend to the wisdom or appropriateness of the penalty recommended. Petitioner also has not cited any authority that she would have been entitled to any greater scope of appellate review if she had been convicted of a crime.

Double Jeopardy

Penalties similar to those provided for violations of the state's Code of Ethics were recognized as valid by this Court in *U.S. v. Halper*, 490 U.S. 435 (1989).[3]

> Nothing in today's ruling precludes the government from seeking the full civil penalty against a defendant who previously has not been punished for the same conduct, even if the civil sanction imposed is punitive. In such a case, the Double Jeopardy Clause simply is not implicated. [*Id.*, 490 U.S. at 450]

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[3] On page 19 of her Petition for Writ, Petitioner states that this Court held that "a civil as well as criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." However, Petitioner neglected to include the phrase "for double jeopardy purposes" after the word "punishment," which may explain her failure to distinguish *Halper* based on the fact that since Petitioner had not been subject to any prior criminal proceeding relative to her pressuring the Carrerous for the loan, the Double Jeopardy Clause did not attach so as to prohibit the imposition of a punitive sanction.

There, this Court held that the government cannot proceed civilly against a defendant who has already been prosecuted for the same offense if it seeks a punitive, rather than a remedial, sanction. *Id.*, 490 U.S. at 448. Because Petitioner had not been prosecuted for the same offense, there simply is no double-jeopardy issue here. Therefore, the reasoning in *Halper* does not apply.

Right to Counsel

Petitioner's claims under the Sixth Amendment likewise are invalid. Apart from the fact that Petitioner was represented by counsel at all stages of the proceedings below, so that she cannot demonstrate that she was affected in any respect by the Respondent's failure to appoint an attorney for her, this Court has held that the right to appointed counsel applies only to cases involving incarceration, *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and potentially to civil proceedings where the court determines that a high interest is at stake, *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). Petitioner has demonstrated no such high interest here. Further, Petitioner was afforded the privilege granted by Section 120.57(1)(b)4, Florida Statutes, of retaining an attorney to represent her in the administrative proceedings before the Respondent, a privilege which she, in fact, exercised.

To the extent that Petitioner may be seeking to argue that her counsel in proceedings before Respondent was ineffective, she waived this argument by failing to raise it properly as a point on appeal before the state appellate court. The only mention of this issue on appeal consisted of one and a half lines in a footnote of her brief. Additionally, where, as here, there is no constitutional right to counsel

there can be no deprivation of effective assistance of counsel. *Wainwright v. Torna*, 455 U.S. 586 (1982).

Right to Jury Trial

Petitioner did not request a jury trial below, or even begin to assert that she had such a right until the filing of her initial brief on appeal. Regardless of whether she may have waived such an alleged right, however, the right to jury trial does not extend to administrative proceedings. The Sixth Amendment requires jury trials in all criminal prosecutions (the Seventh Amendment requires jury trials "in Suits at common law, where the value in controversy shall exceed twenty dollars"). Inasmuch as Respondent, as discussed above, does not impose "criminal" penalties, and inasmuch as proceedings before the Respondent, a statutorily created agency mandated by the Florida Constitution (see Article II, Section 8(f), Florida Constitution), are not suits at common law, Petitioner has not demonstrated that she had a right to a jury trial, even if she had requested one.

B. Notice of Charges (Due Process)

Petitioner argues here, as she did for the first time on appeal, that Respondent violated her right to due process because the complaint and Respondent's probable cause finding alleged that Petitioner had violated Section 112.313(6), Florida Statutes, by "coercing" the Carrerous into making a loan, while neither the hearing officer's recommended order nor Respondent's final order contained any finding that the Petitioner engaged in "coercion."

This is simply a matter of semantics, not a failure of notice reaching constitutional dimension. In the view of the trier of fact, the hearing officer, Petitioner exerted "pressure

on the Carrerous." [Petitioner's Appendix C, p. 21a.] Because the term "coerce" is not a special term of art, it is appropriate to look to the dictionary for its ordinary meaning. The American Heritage College Dictionary, 3d Edition, defines "coerce" as follows:

> 1. To force to act or think in a certain way by use of *pressure*, threat, or intimidation; compel.
> 2. To dominate, restrain, or control forcibly.
> 3. To bring about by force or threat.

[Emphasis supplied.]

Petitioner's use of pressure to obtain the loan from the Carrerous constituted "coercion," as that term is defined above. The pressure referred to was Petitioner's telling Mr. Carrerou, a landlord whose "rent roll" he reasonably assumed was controlled by the Petitioner, that "we" (presumably meaning the Housing Authority) would like him to make a loan to a man who was very important to the Housing Authority as a witness in a federal lawsuit.

Any variation between the wording used in the allegations made against Petitioner before the hearing and the factual and legal conclusions made by the hearing officer and the Respondent was immaterial. There is no significant difference between "coercing" the loan and the hearing officer's finding about Petitioner's "pressure" on the Carrerous. Petitioner--whose testimony that she simply referred Keaton to three possible lenders was completely rejected by the Hearing Officer--has not demonstrated any prejudice; she was on notice of the transaction charged, the persons involved, and the statute at issue. Consequently,

Petitioner's due process right to be informed of the charges against her were not violated.

CONCLUSION

Petitioner has not demonstrated her entitlement to review under either the facts or the law. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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